Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals

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COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS P-02-146 OF 2001, P-02-1032 OF 2001 AND P-02-144 OF 2001
MOKHTAR SIDIN, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA
19 SEPTEMBER 2003

B

Civil Procedure *— Res judicata — Estoppel — Application for removal of caveat — Whether earlier decisions of Federal Court and Court of Appeal had decided with precision the point in issue in the present suit*

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In 1949, the lands in dispute were held under Grant First Grade Nos 4661 and 5650 for Lot Nos 1457 and 1835, Mukim 13, North East District, Penang ('the said lands'). The registered proprietor was Choong Lye Hock Estate Sdn. Bhd ('the CLHE'), which held 25% for itself and 75% of the said lands for the estate of Chor Bah Say ('the deceased'). The majority of the deceased's beneficiaries died resulting in the first to sixth defendants becoming the beneficiaries of the deceased's estate. Thus, the surviving beneficiaries [Chor Phaik Har and Chor Phaik Sim (the surviving beneficiaries)] were entitled to 3/4 undivided share in the said lands. In 1991, the plaintiff intended to buy the said lands from all the beneficiaries of the deceased's estate. However, the surviving beneficiaries refused to sell. They lodged a caveat against the whole of the said lands. Subsequently, two sale and purchase agreements ('the 1992 Agreements') were executed between the CLHE and all the beneficiaries of the deceased's estate, except the surviving beneficiaries, on one part as vendors and the plaintiff as purchaser for a total consideration of RM32,006,000. At this point of time, the administration of the deceased's estate had not been completed. Armed with the 1992 Agreements, the plaintiff applied for the removal of the caveat lodged by the surviving beneficiaries. It was allowed. On appeal, the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 allowed the appeal. The CLHE obtained from the High Court an order for distribution of the deceased's estate to the respective beneficiaries. The distribution was made accordingly and the administration of the deceased's estate was completed. However, prior to the order, the CLHE and the beneficiaries to the 1992 Agreements terminated the 1992 Agreements allegedly on the ground of the plaintiff's failure to furnish the bank guarantees as stipulated therein. Then, the first to sixth defendants entered into a sale and purchase agreement with the seventh defendant ('the GISB') to sell their respective undivided share of the deceased's estate. The GISB entered a caveat on the said Lands. The purchase price had been paid to the defendants (except the fifth defendant) and the memorandum of transfer had been registered (except in respect of the fifth defendant's share). The plaintiff, by an originating summons, sought, inter alia, for a declaration that the 1992 Agreements were still valid and subsisting and for a further order

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A that the GISB and the defendants be injuncted and restrained from transferring, assigning, charging, leasing or entering into or effecting any dealings in respect of the defendants' undivided share in the deceased's estate. The plaintiff, then filed the present action seeking, amongst others, for an injunction to restrain the defendants and the GISB from executing, transferring, assigning, charging and dealing B with the said lands pending the disposal of the originating summons, an order that the transfer of the said lands to GISB be set aside and for specific performance of the 1992 Agreements. The plaintiff contended that the defendants were in breach of the 1992 Agreements and that the 1992 Agreements had not been terminated but were still subsisting and capable of performance. The plaintiff obtained the ex C parte injunction sought for and subsequently filed an application for inter partes hearing. The GISB and the defendants (except the third defendant) applied to set aside the ex parte injunction. The High Court granted the injunction sought by the plaintiff and dismissed the GISB's and the defendants' applications to set aside the ex parte D injunction. On appeal, the injunction was dissolved by the Court of Appeal (see *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90. The principle issue for determination was whether the Federal Court decision and the Court of Appeal decision in the aforesaid cases had decided with precision the point in issue in the action, that is to say, the validity of the 1992 Agreements? After having E dealt with the highlights of the two judgments, the High Court held that to allow the present action to proceed would be an abuse of the process of court and the plaintiff was precluded from re-agitating the same matter which had been finally adjudicated by the Federal Court and the Court of Appeal as their pronouncements on the issue of the validity of the 1992 Agreements was final and conclusive. The plaintiff F appealed.

Held, allowing the appeal:

(1) When the plea of res judicata is raised it is necessary to identify G with precision the issue that was decided in the earlier proceedings. To constitute a res judicata, the earlier judgment must 'necessarily and with precision' determine the point in issue: *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 followed. It was clear from the judgment in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 that the Federal H Court did not at all consider on the validity of the 1992 Agreements. The issue was only raised by the learned counsel for the appellant in the case in his submission before the court. The Federal Court merely held that as the administration of the deceased's estate was not completed at that point of time the beneficiaries had no title to pass to the plaintiff and as such, the I plaintiff was not 'a person or body aggrieved' for the purpose of removal of the private caveat. Res judicata can never be applied in favour of the defendants because res judicata only prohibits a

cause of action from being re-litigated between the same parties but in that case, the defendants were never a party. In *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* although the defendants were a party, res judicata, whether in the narrow sense or the wider sense, cannot apply because the matter involved in the case was in respect of an interlocutory order relating to injunctions. It is trite law that for res judicata to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties or finally puts the case out of court (see p 666E–G).

(2) The circumstances had changed since the decision of the Federal Court in the aforesaid case. The administration of the deceased's estate was completed sometime in 1995 after distribution order was obtained from the High Court by CLHE. That was the position when the present action came before the High Court. A beneficiary to a deceased's estate can enter into a contract of sale of land involving a subject matter which is not subsisting in the sense that the land is still in the deceased's name. However, when the beneficiary comes to be in a position to pass on the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl 1.1 of the relevant 1992 Agreements stated that the sale was in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, having regard to the fact that the administration of the deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction was none other than the sale of *spec successionis*. As specific performance of the 1992 Agreements as prayed for by the plaintiff in the action is an equitable relief, the court will look at the substance rather than the form(see p 667A–C).

(3) The doctrine of res judicata has its roots in equity and hence, retains its discretionary nature that is common to all equitable doctrines. Further, since the purpose of the doctrine of res judicata is to achieve justice, a court may decline to apply it where do so would lead to an unjust result. And further, whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the case lies (see p 668E–F).

[Bahasa Malaysia summary

Pada tahun 1949, tanah-tanah yang dipertikaikan dipegang di bawah Geran Gred Pertama Nombor 4661 dan 5650 bagi Lot-lot nombor 1457 dan 1835, Mukim 13, Daerah Timur Laut, Pulau Pinang ('tanah-tanah tersebut'). Pemilik berdaftar tanah-tanah tersebut adalah Choong Lye Hock Estate Sdn Bhd ('CLHE'), yang memegang 25% untuk dirinya sendiri dan 75% tanah-tanah tersebut bagi estet Chor Bah Say ('simati'). Kebanyakan benefisiari simati telah mati,

A mengakibatkan defendan pertama hingga keenam menjadi benefisiari-benefisiari harta pusaka simati. Oleh itu, benefisiari-benefisiari yang tinggal [Chor Phaik Har dan Chor Phaik Sim ('benefisiari-benefisiari yang tinggal')] berhak mendapat ¾ syer yang belum dibahagikan di dalam tanah-tanah tersebut. Pada tahun 1991, plaintif berniat membeli tanah-tanah tersebut daripada semua benefisiari harta
B pusaka simati. Walau bagaimanapun, benefisiari-benefisiari yang tinggal enggan menjual tanah tersebut. Mereka melaksanakan suatu kaveat ke atas kesemua tanah-tanah tersebut. Kemudiannya, dua perjanjian jualbeli ('Perjanjian-perjanjian 1992') dibuat di antara CLHE dan semua benefisiari harta pusaka simati, kecuali benefisiari-
C benefisiari yang tinggal yang berperanankan penjual dan plaintif sebagai pembeli bagi balasan berjumlah RM32,006,000. Pada ketika ini, pentadbiran harta pusaka simati belum selesai. Menggunakan Perjanjian-perjanjian 1992, plaintif memohon mengeluarkan kaveat yang dilaksanakan oleh benefisiari-benefisiari yang tinggal. Permohonan tersebut dibenarkan. Dalam rayuan, Mahkamah
D Persekutuan dalam *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 membenarkan rayuan tersebut. CLHE memperoleh suatu perintah daripada Mahkamah Tinggi untuk membahagikan harta pusaka simati kepada benefisiari-benefisiari masing-masing. Pembahagian tersebut dilaksanakan dan pentadbiran harta pusaka
E simati pun diselesaikan. Walau bagaimanapun, sebelum perintah tersebut dibuat, CLHE dan benefisiari-benefisiari yang terlibat dalam Perjanjian-perjanjian 1992 telah menamatkan Perjanjian-perjanjian 1992 tersebut, dikatakan atas sebab kegagalan plaintif memberi pihak bank gerenti seperti yang diwajibkan oleh perjanjian-perjanjian tersebut. Setelah itu, defendan pertama hingga keenam membuat
F suatu perjanjian jualbeli dengan defendan ketujuh ('GISB') untuk menjual bahagian harta pusaka simati masing-masing yang belum dibahagikan. GISB melaksanakan suatu kaveat atas tanah-tanah tersebut. Harga belian telah diberi kepada defendan-defendan (kecuali defendan kelima) dan memorandum tukarmilik telahpun didaftarkan (kecuali ke atas bahagian defendan kelima). Plaintif,
G melalui saman pemula, ingin mendapatkan, antara lain, pengisytiharan bahawa Perjanjian-perjanjian 1992 masih sah dan wujud dan perintah tambahan agar GISB dan defendan-defendan diinjunksikan dan dicegah dari memindah, menyerahhak, menggadai, memajak atau melaksanakan atau menyebabkan terlaksananya apa-
H apa urusan ke atas bahagian defendan-defendan yang belum dibahagikan dalam harta pusaka simati. Plaintif kemudiannya memfailkan tindakan ini untuk mendapatkan, antara lain, injunksi untuk mencegah defendan-defendan dan GISB daripada mewasikan, memindah, menyerahhak, menggadai dan menguruskan tanah-tanah tersebut sementara menunggu penyelesaian saman pemula, suatu
I perintah agar pemindahan tanah-tanah tersebut kepada GISB ditolak dan untuk perlaksanaan spresifik Perjanjian-perjanjian 1992. Plaintif menegaskan bahawa defendan-defendan telah memungkiri

Perjanjian-perjanjian 1992 dan bahawa Perjanjian-perjanjian 1992 tersebut tidak ditamatkan tetapi masih sah dan boleh dilaksanakan. Plaintif telah memperoleh injunksi ex parte yang dipinta dan kemudiannya memfailkan suatu permohonan untuk perbicaraan inter partes. GISB dan defendan-defendan tersebut (kecuali defendan ketiga) memohon mengenepikan injunksi ex parte tersebut. Mahkamah Tinggi membenarkan injunksi yang dipinta oleh plaintif dan membuang permohonan-permohonan GISB dan defendan-defendan untuk mengenepikan injunksi ex parte tersebut. Dalam rayuan, injunksi tersebut dibubarkan oleh Mahkamah Rayuan (lihat *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90). Isu utama untuk diputuskan adalah samada keputusan-keputusan Mahkamah Persekutuan dan Mahkamah Rayuan dalam kes-kes yang dinamakan telah memutuskan dengan tepat perkara yang menjadi isu dalam tindakan ini, iaitu, samada Perjanjian-perjanjian 1992 tersebut sah. Setelah membincangkan isu-isu yang penting dalam dua penghakiman tersebut, Mahkamah Tinggi memutuskan bahawa untuk membenarkan tindakan ini diteruskan adalah suatu penyalahgunaan proses mahkamah dan plaintif tersebut dihalang daripada membangkitkan semula perkara yang sama yang telahpun dihukumkan secara muktamad oleh Mahkamah Persekutuan dan Mahkamah Rayuan, kerana penghakiman mahkamah-mahkamah tersebut atas isu keesahan Perjanjian-perjanjian 1992 adalah muktamad dan tidak boleh dipertikaikan. Plaintif tersebut merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Apabila pli res judicata dibangkitkan, ia menjadi wajib untuk memastikan isu yang telah diputuskan dalam prosiding-prosiding yang lebih awal. Untuk membentuk res judicata, penghakiman yang terdahulu mestilah 'wajib dan secara tepat' memutuskan perkara yang menjadi isu: *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 diikut. Ia jelas dari penghakiman *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 bahawa Mahkamah Persekutuan tidak langsung mempertimbangkan keesahan Perjanjian-perjanjian 1992. Isu tersebut hanyalah dibangkitkan oleh peguam perayu dalam kes ini dalam penghujahannya di hadapan mahkamah. Mahkamah Persekutuan hanya memutuskan bahawa oleh kerana pentadbiran harta pusaka simati belum selesai pada ketika itu, benefisiari-benefisiari tersebut tidak mempunyai hakmilik untuk dipindah kepada plaintif dan oleh itu, plaintif bukanlah 'suatu pihak yang terkilan' bagi tujuan membuang kaveat persendirian. Res judicata tidak boleh dipakai bagi kepentingan defendan-defendan kerana res judicata cuma menghalang suatu kausa tindakan daripada dilitigasikan semula oleh pihak-pihak yang sama, tetapi dalam kes ini, defendan-defendan tidak pernah menjadi pihak. Dalam *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd*, walaupun defendan-defendan merupakan pihak, res judicata, samada dalam erti yang sempit atau yang lebih luas, tidak boleh dipakai kerana

perkara tersebut melibatkan perintah interlokutori berkenaan injunksi. Ia pengetahuan ramai bahawa untuk membolehkan pemakaian res judicata, prosiding-prosiding tersebut mestilah membawa akibat suatu penghakiman muktamad atau dekri, iaitu, sesuatu yang menhukum hak terakhir pihak-pihak atau secara muktamad mengakhiri dan mengeluarkan kes tersebut dari mahkamah (lihat ms 666E–G).

(2) Hal keadaan telah berubah sejak keputusan Mahkamah Persekutuan dalam kes tersebut. Pentadbiran harta pusaka simati telah selesai pada tahun 1995 selepas perintah pembahagian telah diperoleh daripada Mahkamah Tinggi oleh CLHE. Begitulah kedudukannya semasa tindakan ini tiba di Mahkamah Tinggi. Suatu benefisiari kepada harta pusaka simati boleh melaksanakan kontrak penjualan tanah ke atas suatu perkara yang tidak wujud, dalam ertikata tanah tersebut masih di bawah nama simati. Walau bagaimanapun, apabila benefisiari mencapai kedudukan di mana beliau boleh memindah hakmilik kepada seorang pembeli, benefisiari tersebut boleh dipaksa oleh pembeli tersebut untuk menepati kontrak tersebut atas kepentingan tersebut. Walaupun dalam rayuan ini, perkara 1.1 Perjanjian-perjanjian 1992 menyatakan bahawa jualan tersebut adalah ke atas semua hak, hakmilik, kepentingan dan bahagian semua benefisiari ke atas tanah-tanah tersebut, memandangkan bahawa pentadiran harta pusaka simati belum selesai pada masa perlaksanaannya, perkara yang dilibatkan dalam transaksi ini merupakan jualan *spec successionis*. Oleh kerana perlaksanaan spesifik Perjanjian-perjanjian 1992 seperti yang dipinta oleh plaintif dalam tindakan ini adalah suatu relif ekuiti, mahkamah akan mempertimbangkan kebenaran dan bukannya tatacara (lihat ms 667A–C).

(3) Doktrin res judicata mempunyai asal-usul dalam ekuiti dan oleh itu, membendung sifat budibicara yang terdapat di dalam semua doktrin ekuiti. Selain itu, oleh kerana tujuan doktrin res judicata adalah untuk memastikan keadilan, mahkamah boleh menolak pemakaiannya sekiranya penerimaannya akan menyebabkan suatu akibat yang tidak adil. Juga, samada res judicata dalam maksud yang lebih luas patut diterima untuk menghalang suatu tuntutan adalah suatu perkara yang perlu diputuskan atas fakta-fakta setiap kes, dan dengan mempertimbangkan keadilan kes tersebut (lihat ms 668E–F).

Notes

For cases on estoppel, res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5129–5133.

Cases referred to

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188 (folld) A
Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd & Goh Keat Poh (Wasi dan Pemegang Amanah Harta Pusaka Chor Sin Khen, si mati) dan lain-lain lwn Farlim Properties Sdn Bhd [1997] 3 MLJ 90 (refd)
Kersah La'usin v Sikin Menan [1966] 2 MLJ 20 (refd)
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49 (folld) B
Nik Mohamed Salleh v Tengku Besar Zabidah [1971] 1 MLJ 73 (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24 (refd)

Legislation referred to

C
Contracts (Malay States) Ordinance 1950 s 44(1)
Contracts Act 1950 s 44(1)
National Land Code s 327
Rules of the High Court 1980 O 18 r 19
Specific Relief (Malay States) Ordinance 1950 s 17(a)
Specific Relief Act 1950 s 17 D

Appeals from: Civil Suit No 22–307 of 1996 and Originating Summons No 24–1084 of 2001 (High Court, Pulau Pinang)

Datuk Mahinder Singh (*Shahida Harun* with him) (*Mahinder Singh Dulku & Co*) for the plaintiff/appellant. E
Kirubakaran (*Joseph Yeo* and *Ramanathan* with him) (*Ram Pillai & Assoc*) for the defendants/respondents.

Mohd Noor Ahmad JCA (delivering judgment of the court): Three appeals were before us. The first appeal, Civil Appeal No P–02–146 of F
2001, is the appeal by the plaintiff against the decision of the learned judge who allowed the defendant's appeal against the decision of the learned senior assistant registrar who dismissed the defendant's applications for striking out under O 18 r 19 of the Rules of the High Court 1980. In the second appeal, Civil Appeal No P–02–1032 of 2001, the plaintiff appealed against the decision of another learned Judge who dismissed the plaintiffs G
application for the extension of a Private Caveat No 2669/98 Jilid 541 Folio 184 lodged by it against 41 lots listed therein (except Lot 500, Mukim 16, North East District, Penang and Lot 1561, Section 3, Town of Air Itam, Penang) until the final disposal of the third appeal. The third appeal, Civil Appeal No P–02–144 of 2001 is an appeal by the plaintiff against the H
decision of the learned judge who dismissed the plaintiffs action in consequence of the decision appealed against in Civil Appeal No P–02–146 of 2001. We heard the first appeal first. We allowed the appeal. As the result, we also allowed the third appeal. We ordered one set of costs here and in the High Court for the two appeals. We remitted the action to the High Court for full trial. We did not proceed with the second appeal as a I
fresh caveat had been entered by the plaintiff.

To summarize the undisputed facts.

(1) In 1949, the lands in dispute were held under Grant First Grade Nos 4661 and 5650 for Lot Nos 1457 and 1835, Mukim 13, North East District, Penang ('the said lands'). The registered proprietor was Choong Lye Hock Estate Sdn. Bhd ('the CLHE'), which held 25% for itself and 75% of the said Lands for the estate of Chor Bah Say ('the deceased'). The majority of the deceased's beneficiaries died resulting in the first to sixth defendants becoming the beneficiaries of the deceased's estate. Thus, the surviving beneficiaries [Chor Phaik Har and Chor Phaik Sim (the surviving beneficiaries)] were entitled to 3/4 undivided share in the said lands.

(2) In 1991, the plaintiff intended to buy the said lands from all the beneficiaries of the deceased's estate. However, the surviving beneficiaries refused to sell. They lodged a caveat against the whole of the said lands. Subsequently, on 23 January 1992, two sale and purchase agreements ('the 1992 Agreements') were executed between the CLHE and all the beneficiaries of the deceased's estate, except the surviving beneficiaries, on one part as vendors and the plaintiff as purchaser for a total consideration of RM32,006,000. At this point of time, the administration of the deceased's estate had not been completed. Armed with the 1992 Agreements, the plaintiff applied for the removal of the caveat lodged by the surviving beneficiaries. It was allowed. On appeal, the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 allowed the appeal.

(3) On 19 May 1995, the CLHE obtained from the High Court an order for distribution of the deceased's estate to the respective beneficiaries. The distribution was made accordingly and the administration of the deceased's estate was completed. However, prior to the order, on 11 January 1995, the CLHE and the beneficiaries to the 1992 Agreements terminated the 1992 Agreements allegedly on the ground of the plaintiff's failure to furnish the Bank Guarantees as stipulated therein. Then, on 21 March 1995, the first to sixth defendants entered into a sale and purchase agreement with the seventh defendant ('the GISB') to sell their respective undivided share of the deceased's estate. On 17 April 1996, the GISB entered a caveat on the said lands. The purchase price had been paid to the defendants (except the fifth defendant) and the memorandum of transfer had been registered (except in respect of the fifth defendant's share).

(4) On 8 May 1995, the plaintiff, by an originating summons, sought, inter alia, for a declaration that the 1992 Agreements were still valid and subsisting and for a further order that the GISB and the defendants be injuncted and restrained from transferring, assigning, charging, leasing or entering into or effecting any dealings in respect of the defendants' undivided share in the deceased's estate. And on 27 September 1996, the plaintiff filed the present action seeking, amongst others, for an injunction to restrain the defendants and the GISB from executing, transferring, assigning, charging and dealing with the said lands pending the disposal of the originating summons, an order that the transfer of the said lands to GISB be set aside and

for specific performance of the 1992 Agreements. The plaintiff contended that the defendants were in breach of the 1992 Agreements and that the 1992 Agreements had not been terminated but were still subsisting and capable of performance. On 3 October 1996, the plaintiff obtained the ex parte injunction sought for and subsequently filed an application for inter partes hearing. The GISB and the defendants (except the third defendant) applied to set aside the exparte injunction. On 11 December 1996, the High Court granted the injunction sought by the plaintiff and dismissed the GISB's and the defendants' applications to set aside the ex parte injunction. On appeal, the injunction was dissolved by the Court of Appeal (see *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd & Goh Keat Poh (Wasi dan Pemegang Amanah Harta Pusaka Chor Sin Khen, si mati) dan lain-lain lwn Farlim Properties Sdn Bhd* [1997] 3 MLJ 90).

We scrutinized the judgment of the learned judge. She stated that the principle issue for determination in the appeal before her is whether the Federal Court decision and the Court of Appeal decision in the aforesaid cases had decided with precision the point in issue in the action, that is to say, the validity of the 1992 Agreements? After having dealt with the highlights of the two judgments, she opined:

After carefully scrutinizing the fundamental and collateral issues in the judgment of the Federal Court and the judgment of the Court of Appeal referred to by counsels in their respective submissions I am of the following opinion. As for the judgment of the Federal Court, in deciding the issue whether Farlim was a person aggrieved within the meaning of s 327 of the NLC and whether they could apply for the removal of a caveat. I am of the view that in deciding the issues before it, it did go into the issue of the validity of the 1992 Agreements. The capacity of the beneficiaries to enter into the Sale and Purchase Agreements was taken as an important issue by the Federal Court. The Federal Court then made an unequivocal finding that the beneficiary defendants did not have the legal capacity to sell all the rights, title and interest in the said lands to Farlim as the Estate of Chor Bah Say remained unadministered and distributed. The 1992 Agreements were held to be unenforceable and void because the beneficiaries could not have consented to sell what they did not have. In my considered judgment, the pronouncement by the Federal Court constitutes a binding precedent constituting issue estoppel precluding Farlim from questioning the validity of the 1992 Agreements and binding on all parties upon whom they were pronounced. Admittedly, the first and sixth defendants were not parties to the Federal Court case. However, the subject matter of the Federal Court case and the instant case are the same and the plaintiff is therefore bound by the findings of the Federal Court.

Likewise in respect of the Court of Appeal judgment in dissolving the injunction. I am of the considered opinion that the Court of Appeal in dissolving the injunction must necessarily be construed to have considered the question of whether the issues raised, i.e. whether 1992 Agreements were valid and whether the 1992 Agreements had been validly terminated constitutes serious question to be tried. The respective sale and purchase agree-

ments between the beneficiary defendants and GISB were clearly discussed in the Court of Appeal judgment. By dissolving the injunction the Court of Appeal clearly found that there were no issues to be tried.

The court is bound by both the Federal Court and the Court of Appeal judgments. Having carefully studied and perused the issues and judgments concerned, I am of the considered opinion that, although the prayers sought for in those cases were different, the subject matter under scrutiny in the appeals before the Federal Court and the Court of Appeal, were clearly the validity of the 1992 Agreements.

She concluded that to allow the action to proceed is an abuse of the process of Court and the plaintiff is precluded from re-agitating the same matter which had been finally adjudicated by the Federal Court and the Court of Appeal as their pronouncements on the issue of the validity of the 1992 Agreements is final and conclusive. And finally, she allowed the appeals by reason that the statement of claim discloses no cause of action against the defendants and dismissed the action with costs.

Before us, the learned counsel for the plaintiff contended that:

(a) the Federal Court in the aforesaid case did not make any pronouncement on the validity of the 1992 Agreements. What was decided in the case is merely that because at the date of the execution of the 1992 Agreements the administration of the deceased's estate had not been completed the beneficiaries had no interest or property in the estate so as to give them any title to the lands to pass to the plaintiff. In the result, the plaintiff could not rely on the 1992 Agreements to justify its status as 'a person aggrieved' under s 327 of the National Land Code for the removal of the caveat. In short, the Federal Court did not determine with precision on the validity of the 1992 Agreements. The Court of Appeal in the aforesaid case also did not determine as such. It was an interlocutory proceeding before the Court of Appeal. Hence, the decision of the Court of Appeal cannot be res judicate;

(b) The Federal Court case was decided in 1992. Since then there had been changed circumstances. Firstly, on the conduct of the defendants. Previously, the beneficiaries did not quarrel about the validity of the 1992 Agreements. Only in 1995, at the time when the aforesaid Court of Appeal case was decided, they changed their stance and conspired by the seventh defendant they wrongfully terminated the 1992 Agreements. Yet, they retained the deposit including the additional sums paid by the plaintiff under the 1992 Agreements and used the money to pay the arrears of quit rent on the said lands for the relevant years. The seventh defendant was not a bona fide purchaser. Hence, res judicata does not apply. The learned judge should have considered the causes of action in the statement of claim in the light of contract law. Secondly, the administration of the deceased's estate was completed by then. As such, although the beneficiaries had no title to the estate they could enter into the relevant 1992 Agreements,

which is not void but only unenforceable. Once they had acquired the title after the administration of the estate was completed they can be compelled to perform the contract under s 17 of the Specific Relief Act 1950 ('the SRA'); and

(c) on the facts of the case, res judicata should not be applied because it will result in injustice to the plaintiff.

The learned counsel cited the relevant authorities to fortify his argument, which will be reflected in our findings.

On the contrary, the learned counsel for the defendants asserted that:

(a) the learned judge applied res judicata in the wider sense, that is to say, issue estoppel. By necessary reasoning, the Federal Court in the aforesaid case would have decided on the validity of the 1992 Agreements though no specific finding was made on the issue. For the court to decide whether the plaintiff was an aggrieved party it invited the court to decide on the validity of the 1992 Agreements. The issue on s 17 of the SRA was before the High Court judge and the Federal Court in the aforesaid case. Hence, the matter cannot be relitigated;

(b) the relevant 1992 Agreements was in respect of the purchase of the beneficiaries' shares in the estate, but not the right of inheritance and *spes successionis*. Hence, s 17 of the SRA is not relevant; and

(c) the learned judge had exercised her discretion correctly in making the decision. Therefore, the decision should not be disturbed.

A lucid exposition on the doctrine of res judicata, that is to say, doctrine of estoppel per rem judicatum can be found in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. In that case, the finance company granted certain fixed loan to the borrower to finance a housing project. As a security for the loan, the borrower charged several pieces of land to the finance company. The borrower defaulted in his payments and the finance company obtained an order for sale of the charged lands from the land administrator. As a consequence of the borrower being unable to utilize the balance of the loan, the borrower had difficulty in completing the housing project. Then, the borrower filed an originating motion in the High Court ('the first action') against the finance company to set aside the order for sale and for damages suffered by the borrower in consequence of the failure of the housing project. The borrower alleged that the finance company was in breach of the loan agreement in withdrawing the loan facilities because the dates of the drawdown of the loan were extended or had been waived by the finance company. The High Court dismissed the borrower's application. On appeal, the Supreme Court dismissed the appeal. The borrower then brought another action ('the second action') against the finance company in the High Court, claiming for damages on the same grounds as that in the first action. The finance company applied to strike out the borrower's statement of claim on a plea of res judicata. The High Court dismissed the application of the finance company. The finance company appealed to the Federal Court.

A Peh Swee Chin FCJ, having distilled from a host of authorities on the doctrine of res judicata stated:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadam cause*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a res judicata creates an estoppel per rem judicatum, the doctrine of res judicata is really the doctrine of *estoppel per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *resjudicata* is a rule of procedure and that an *estoppel per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
>
> ... there are in fact two kinds of *estoppel per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
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> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court of a particular remedy are determined in a final judgment and such right of action ie the cause of action, merges into the said final judgment; in laymen's language, the cause of action has turned into the said final judgment. The said cause of action may not relitigated between the same parties because it is *res judicata*.
>
> In order to prevent multiplicity of actions and also in order to protect the underlying rationales of *estoppel per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.
>
> On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties.
>
> This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment. A

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and NOT to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata ie* doctrine of *estoppel per remjudicatum.* B

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata,* in other words, with the doctrine of *estoppel per rem judicatum.* It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation. C D

The plea of res judicata succeeded and the appeal was allowed. E

When the plea of res judicata is raised, it is necessary to identity with precision the issue that was decided in the earlier proceedings. In *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24, Chang Min Tat FC held that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49, 'necessarily and with precision' determine the point in issue. The decision was affirmed by the Privy Council in [1981] 1 MLJ 54. To us, it is indeed clear from the judgment in *Chor Phaik Har v Farlim Properties Sdn Bhd* that the Federal Court did not at all consider on the validity of the 1992 Agreements. The issue was only raised by the learned counsel for the Appellant in the case in his submission before the Court. However, the Court merely held that as the administration of the deceased's estate was not completed at that point of time the beneficiaries had no title to pass to the plaintiff and as such, the plaintiff was not 'a person or body aggrieved' for the purpose of removal of the private caveat. Whatever it is res judicata can never be applied in favour of the defendants because res judicata only prohibits a cause of action from being re-litigated between the same parties but in that case the defendants were never a party. And in *Gerak Indera Sdn Bhd lwn Farlim Properties Sdn Bhd* although the defendants were a party, res judicata, whether in the narrow sense or the wider sense, cannot apply because the matter involved in the case is in respect of an interlocutory order relating to injunctions. It is trite law that for res judicata to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties or finally puts the case out of court. F G H I

A The circumstances had changed since the decision of the Federal Court in the aforesaid case. The administration of the deceased's estate was completed sometime in 1995 after distribution order was obtained from the High Court by CLHE on 19 May 1995. That was the position when the appeal came before the learned Judge. In *Nik Mohamed Salleh v Tengku Besar Zabidah* [1971] 1 MLJ 73, the Federal Court held that although the B beneficiaries of the deceased's estate had no title to the land which they agreed to sell under an agreement they had a spes successionis in the land. As such, the administrator of the deceased's estate was compelled to transfer the whole land to the purchaser, by virtue of the provisions of s 17(a) of the Specific Relief (Malay States) Ordinance 1950 ('the SR (MS) Ordinance') C and s 44(1) of the Contracts (Malay States) Ordinance 1950 ('the C(MS) Ordinance'). Section 17(a) of the SRA, which is in pari materia with the same section of the SR(MS) Ordinance, states:

> Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:
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> D
>
> (a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of that interest; ...

And s 44(1) of the Contracts Act 1950, which is similar to the same section E of the C(MS) Ordinance, provides:

> (1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.

In *Kersah La'usin v Sikin Menan* [1966] 2 MLJ 20 where, under an F agreement, the sole beneficiary sold the land registered under his deceased mother's name, in his judgment Raja Azlan Shah J (as His Highness was then) stated:

> The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was G then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself as answer to a suit of specific performance by the purchaser; *Brickies v Snell* (1916) 2 A.C. 599. Actual possession of H both the legal estate and any equitable rights are not pre-requisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.

What is discernible from the authorities is that a beneficiary to a deceased's I estate can enter into a contract of sale of land involving a subject mater which is not subsisting in the sense that the land is still in the deceased's name. However, when the beneficiary comes to be in a position to pass on

the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl 1.1. of the relevant 1992 Agreements states that the sale is in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, to our mind, having regard to the fact that the administration of the deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction is none other than the sale of spec successionis. As specific performance of the 1992 Agreements as prayed for by the plaintiff in the action is an equitable relief, the court will look at the substance rather than the form. Anyway, it is still open to the plaintiff to amend its pleading to cover this point, if it so wishes, before the trial of the action.

The plaintiff alleged that, besides the deposit of RM1.2m, it had paid additional sums to the defendants (re-para 39(ix) of the amended statement of claim at p 51 Rekod Rayuan Jilid 1). However, the defendants merely made a general denial of the allegation (re-para 35 of the amended statement of defence at p 109 Rekod Rayuan Jilid 1). And it is evident that the arrears of quit rent on Lot 1561 and the quit rent on the other lots for 1993 were settled out of the deposit paid by the plaintiff under the 1992 Agreements (re-para 16 at p 489 Rekod Rayuan Jilid II). Further, the deposit and the additional sums paid by the plaintiff are being kept by the defendants. And further, the defendants changed their stance only after having obtained title to the said lands. On those facts, the learned judge ought not to have applied the doctrine of res judicata because to do so would lead to an unjust result. We are in complete agreement with the statement of this court in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, to the effect that the doctrine of res judicata has its roots in equity and hence, retains its discretionary nature that is common to all equitable doctrines. Further, since the purpose of the doctrine of res judicata is to achieve justice, a court may decline to apply it where do so would lead to an unjust result. And further, whether res judicata in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the case lies.

Therefore, on the aforesaid reasons, we are satisfied that the learned jdge had erred in interfering with the exercise of the discretion by the learned snior asistant rgistrar in the striking out applications.

Appeal allowed.

Reported by Peter Ling